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Paper No. 17
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re WIXT TV, Inc.

Serial No. 75/370,316

Martin G. Linihan of Hodgson Russ Andrews Woods & Goodyear, LLP
for WIXT TV, Inc.

Amos T. Matthews, Trademark Examining Attorney, Law Office 108
(David Shallant, Managing Attorney).

Before Bucher, Holtzman and Rogers, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

This is an appeal from the final refusal to register NEWS CHANNEL 9 on the Supplemental Register for "television program services," in International Class 41.¹ While applicant originally sought registration on the Principal Register, after receiving the initial refusal under Section 2(e)(1) of the Act, 15 USC §1052(e)(1), applicant amended this application to seek registration on the Supplemental Register. The Trademark Examining Attorney then refused registration on the ground that the asserted mark is generic as applied to applicant's television program services and therefore it is incapable of

identifying these services and distinguishing them from similar services of others.

In order to meet his burden of demonstrating genericness, the Trademark Examining Attorney has submitted for the record dictionary entries for the words "news"² and "channel."³ He did a search on the LEXIS/NEXIS® database that resulted in almost thirty thousand "hits" for the search term "news channel" (or the plural form, "news channels"). He submitted for the record the first two dozen excerpts containing this terminology. The following are examples of the context of such usages from this and subsequent searches of the NEXIS® database:

... include all Tier I programs plus Dow Jones, Newscable, foreign broadcast signals and a satellite **news channel**. "Everything You Wanted to Know about Cable TV," The Washington Post, October 6, 1982, Virginia Weekly, p. 10.

... beyond it is Six News Now, its 24-hour-a-day **news channel**. "Reader Friendly," American Journalism Review, August 2000, p. 22.

... celebrate the six-month anniversary of CNN Turk, its first free 24-hour **news channel** outside the United States. "CNN meets the Turkish High

¹ Application Serial No. 75/370,316 filed on October 8, 1997. The application is based on asserted dates of first use and first use in commerce on August 15, 1996.

² **News**: 1.a. Information about recent events or happenings, especially as reported by newspapers, periodicals, radio or television. b. A presentation of such information, as in a newspaper or on a newscast. The American Heritage Dictionary of the English Language, Third Edition, electronic version © 1992.

³ **Channel**: 8. *Electronics*. A specified frequency band for the transmission and reception of electromagnetic signals, as for television signals. The American Heritage Dictionary of the English Language, Third Edition, electronic version © 1992.

Council," American Journalism Review, August 2000, p. 26.

The advent of cable and the Internet has begotten a plethora of 24-hour **news channels** and media Web sites, knocking the networks off the top of viewers' and advertisers' lists. "Plugged In," The Boston Herald, July 23, 2000, p. 4.

... Animal Planet, Court TV, the Golf Channel, Classic Sports Network, CSPAN 2, HBO, Galavision, Fox **News Channel** and WWTO Channel 35. These and eight other channels currently listed in *TVWeek* will be added to the daily television page ... "TV Listings Change," Chicago Tribune, March 17, 1999, p. 3.

Cable **news channel** CNBC gave viewers running updates on the Dow's progress toward the magic mark. "Dow close, but no 10,000," USA Today, March 16, 1999, p. 13.

The agencies' presentations were open to the public. Among the audience of 80-100 were the local TV **news channels** and onlookers from non-contesting agencies. "Vegas Review has Inimitable Style," Adweek, March 15, 1999.

Furthermore, the Trademark Examining Attorney has placed a number of NEXIS® articles into the record showing "News Channel 9" used with reference to WFTV in Orlando, FL, to WTVN in Chattanooga, TN, to Bay News Channel 9 in Florida's Tampa Bay area, to TCI cable channel 9 in Baton Rouge, LA, and to Newnan Utilities Cable TV channel 9 in Newnan, GA.

In spite of this evidence, applicant argues throughout the prosecution of this application that the Trademark Examining Attorney has failed to meet his burden of showing that NEWS CHANNEL 9 is incapable of functioning as a source indicator.

When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney have submitted main briefs. Applicant did not request an oral hearing. We affirm the refusal to register.

As our principal reviewing court has stated:

...[d]etermining whether a mark is generic ... involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?

H. Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 990, 228 USPQ 528, 530 (Fed. Cir. 1986).

The test has two elements. The first is to identify the genus or class of services at issue. The second element is to determine if the relevant purchasing public understands the designation sought to be registered primarily to refer to that genus or class of services. In the Marvin Ginn case, the term FIRE CHIEF was held not to be generic for a magazine directed to the field of firefighting, because there was no evidence that the relevant purchasing public refers to a class of fire fighting publications as FIRE CHIEF, and also because the term sought to be registered was neither the name of the firefighting industry nor about the firefighting industry.

All of the uses drawn from the NEXIS® database denote a particular type of television program content focusing on "recent events or happenings."⁴ Given how often the terminology "news channel" appears in print, it is readily understood to refer to television news presentations found at a specified frequency or location on the television dial. While many of these uses suggest a television channel devoted exclusively to news 24-hours a day,⁵ others refer to the news department of local television stations or even to prominent news segments within a broader format of such stations. Judging from the specimens of record, ads from the Syracuse Herald American touting applicant's local newscasts, it is this latter usage that fits applicant's services:



Given that the entire mark herein is NEWS CHANNEL 9, the Trademark Examining Attorney has placed a number of LEXIS-NEXIS® articles into the record showing the use of "News Channel" followed by the numeral, "9." Hence, the articles show multiple

⁴ See definition of "News," footnote 2, *supra*.

⁵ Cf. In re Conus Communications Co., 23 USPQ2d 1717 (TTAB 1992) [ALL NEWS CHANNEL found to be generic for television broadcasting and production services].

uses of the entire alleged mark herein, "News Channel 9," used with reference to television stations in Orlando and Tampa Bay (FL), Chattanooga (TN), Baton Rouge (LA) and Newnan (GA).

Similar to applicant's usage, these appear to be references to prominent news segments within a broader format of these television stations. In this way, the record supports a finding that television viewers know quite well - that each local cable system, metropolitan area or other distinct geographical region has its own "Channel 9," and that these channels frequently, and sometimes exclusively, feature news programs.

Accordingly, we find that under the first part of the Marvin Ginn test, the genus of services at issue here is television news programs accessible via channel 9 on one's local television dial.

In order to answer the second question of the Marvin Ginn test, the Trademark Examining Attorney has supplied us with dictionary definitions and a variety of uses from the NEXIS® database. Then in response to the inquiry of the Trademark Examining Attorney, applicant confirmed that "the numeral 9 identifies the number of the television channel on which applicant broadcasts." (applicant's response of December 28, 1998). Applying the second prong of the Marvin Ginn test, we find that "News Channel 9" is understood to refer to the genus of services at issue, namely, a newscast found at a specified

television frequency. Hence, NEWS CHANNEL 9 is deemed to be generic for applicant's services.

On the basis of the present record, it would appear difficult if not impossible for another television station in another part of the country to convey to the public that its services share these service attributes without using the words "News Channel 9." Hence, applicant cannot deprive other television stations around the country of the right to call this service by its name. See Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9, 189 USPQ 759, 764 (2nd Cir. 1976).

As Professor McCarthy stresses, in citing to Judge Learned Hand's decision holding the term ASPIRIN to be generic, the question should be "what does the relevant public think the term connotes?" 2 J. McCarthy, McCarthy on Trademarks and Unfair Competition, Section 12:4 at page 12-9 (4th ed. 1998). The record shows that as members of the public travel from one part of the country to another, they would view any promotion of NEWS CHANNEL 9 as indicating only the opportunity to obtain television news programs on channel 9, whether it be through a local television cable system or from a local VHF broadcast station.

In arguing for a reversal of the position taken by the Trademark Examining Attorney, applicant points out that the Office has within the past several years registered NEWSCHANNEL

10⁶ and NEWSCHANNEL 12⁷ on the Supplemental Register.

Accordingly, applicant argues that the United States Patent & Trademark Office should treat this mark in the same manner as these two marks for which it issued federal trademark registrations for similar services.

While uniform treatment under the Trademark Act is desirable, our task on this appeal is to determine whether applicant's mark is registrable based upon the factual record before us. The records developed in the applications which resulted in registrations of NEWSCHANNEL 10 and NEWSCHANNEL 12 on the Supplemental Register are not before us. See In re Pennzoil Products Co., 20 USPQ2d 1753, 1758 (TTAB 1991). In any event, each case that comes before this Board must be resolved on its own merits. See In re Citibank, N.A., 225 USPQ 612, 616 (TTAB 1985); In re Half Price Books, Records, Magazines, Inc., 225 USPQ 219, 221 (TTAB 1984); and In re Hunter Publishing Co., 204 USPQ 957, 961 (TTAB 1979).

In conclusion, we find that NEWS CHANNEL 9 is incapable of serving as a source indicator for applicant's television program services.

Decision: The refusal to register is affirmed.

⁶ Reg. No. 2,236,239, issued on the Supplemental Register on March 30, 1999, for "television broadcast services."

⁷ Reg. No. 2,305,000, issued on the Supplemental Register on August 30, 1999, for "television broadcasting services," with a disclaimer of the term "NEWSCHANNEL."